

No. 15348  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COM-  
PANY, a corporation,

*Appellant,*

*vs.*

PORTER BARRETT,

*Appellee.*

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**APPELLANT'S REPLY BRIEF.**

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**I.**

**Some Observations on Appellee's Brief.**

On page 4 of his brief, counsel for Mr. Barrett states that it is only natural that Mr. Barrett should have immediate relief from his affliction, since his case had been settled and he was merely awaiting the check which had been promised by the defendant. This is an interesting observation, since it assumes that an injured person who magnifies his disability through the commencement of legal proceedings is entitled to collect a judgment based upon the magnified symptomology, even though it is expected to disappear at the conclusion of the litigation.

On page 7 of his brief, counsel quotes from the record wherein appellant's counsel stated that Dr. Weaver's complicity "\* \* \* at least indicates a gross exaggeration."

Then in the next sentence Mr. Barrett's counsel states that the Railway Company's counsel admitted that "\* \* \* at the most he [Barrett] has shown an exaggeration \* \* \*"

Counsel has argued at great length the question of fraud, and that it is never presumed. This is true. The rule, however, provides that judgments may be set aside for fraud, misrepresentation, or other misconduct.

## II.

### The Effect of Appellee's Counter-Affidavits.

The nine affidavits filed by appellee in opposition to our motion do not contradict one fact contained in the affidavits filed by appellant in support of the motion, except that Dr. Weaver denied that he had ever talked with counsel for appellant.

Appellee did not deny that his activities were normal in all respects while he was under the surveillance of Messrs. Perry and Wilson. He did not deny that he came to the office of counsel for appellant on June 20, 1956, twitching his neck; that while he talked with counsel he jerked his neck in the same manner as he did at the trial; nor does appellee deny that after he left the office of appellant's counsel and stood in the corridor waiting for the elevator he ceased his twitching and remained in a normal, relaxed posture.

Appellee's position appears to be that he merely *exaggerated* his complaints. If we assume, *arguendo*, that appellee did no more than grossly exaggerate his complaints, he is still guilty of misrepresentation and other misconduct. In his own affidavit, appellee states that the jerking is worse under times of stress such as when he sees lawyers. Apparently the effect of seeing a lawyer is

quite dynamic, but fortunately for Mr. Barrett, all of the stress and strain disappears as soon as he gets out of the lawyer's sight.

The affidavits filed by appellee's co-workers are of no probative value, because they lack the essential information needed to determine whether or not appellee jerked his head before he went to see Dr. Darrington Weaver, and to what extent he jerked his head. Roberts, Nash and Bozeman state in their affidavits that "Several months after the accident heretofore mentioned, I noticed Porter Barrett jerking his head at intervals during our conversations." The witnesses do not state whether these conversations were on or off the job, that is, before or after December, 1955. Nor do the affidavits give any clue to what the witnesses mean by "several months." Even if the witnesses could not remember the exact date, they could have remembered whether they noticed the twitching before or after Barrett laid off work.

Affiant Robinson stated that he has known Barrett for ten years, that he lives in the same neighborhood with Barrett and sees him fifteen days each month; yet he can say no more than that "during the past 'several months' I have observed him intermittently jerking his head."

Affiants Mitchell, Goldsmith and Davis say that they first noticed the jerking "about a year ago." Is eight months "about a year ago?" If so, then they have added nothing to the other affidavits. Again, there is no attempt to show that the twitching was observed before appellee quit working in December, 1955.

Moreover, neither appellee's wife nor his closest friend, David Holmes, filed affidavits in this case. The motion

pictures reveal that Holmes and appellee's wife are appellee's constant companions. One would expect their memories on this subject to be more precise.

We contend that appellee's affidavits in opposition to appellant's motion make it abundantly clear that he misrepresented the facts, and was guilty of misconduct during the trial of this case. If appellee elects to more precisely define the frequency with which he suffers from the affliction, *after the verdict has been rendered*, then is it not proper for the Court to more precisely determine the damages, if any, to which he is entitled under this new testimony? Should the appellant be required to pay, under order of Court, on the basis of testimony which now has been repudiated, or "more clearly expressed", so as to give an impression totally different from that given at the time of trial? We think not.

Respectfully submitted,

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